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No. 73-413

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner's appeal from a federal conviction was conditionally dismissed by the court of appeals, and his appeal bond conditionally revoked, pursuant to government counsel's representation that he had jumped bail and become a fugitive while contemporaneously undergoing trial on unrelated state charges. Petitioner challenges the conditional orders on the grounds that he is a fugitive only from his state prosecution and that the government's supporting allegations (which he has not denied) were not sworn to. The revocation order is challenged on the additional ground that petitioner allegedly was not avised that the request therefor was under consideration.

525-282—73——1

On June 18, 1973 (the same day as the district court hearing), the clerk of the court of appeals mailed petitioner a notice advising him of the filing of the motion to dismiss the appeal and stating that the motion would be presented to the court for disposition, together with any response petitioner might file, on June 25 (R. 6; Pet. 9). Upon receipt of the notice, petitioner, who had been proceeding *pro se* on his appeal, retained his present counsel (an attorney who had not represented him either in the state or federal trial proceedings), and at the attorney's request petitioner's time for responding to the motion was extended to July 3, 1973 (R. 6–7; Pet. 9). On June 19, 1973, pursuant to the district court's ruling that the motion to forfeit the appeal bond should more appropriately be addressed to the court of appeals, the government filed such a motion in that court (R. 6–8; Pet. 9–10). Copies of the motion, in which the proceedings to date were summarized, were served by mail by government counsel on petitioner's new counsel as well as on petitioner (R. 8).

On July 3, 1973, petitioner, through his counsel, filed in the court of appeals a response to the motion to dismiss (R. 13–14). Petitioner denied in the pleading that he had violated any of the terms of his appeal bond and said there was "no evidence that" he was or had been a fugitive, or that he would fail to abide by the court's judgment, whatever it might be (*ibid.*). He did not, however, deny the government's specific factual allegations relating to his escape from the Fulton County Courthouse while on state

trial for forgery, the ensuing forfeiture of his state bail bond, and the issuance of a bench warrant for his arrest. Nor did he question the sufficiency of the allegations as a basis for granting the relief requested, on the ground that they had not been verified by affidavit. No independent response to the forfeiture motion was filed.

On August 2, 1973, the court of appeals, in the judgment here challenged, conditionally revoked petitioner's appeal bond, conditionally dismissed the appeal, and remanded the cause to the district court for a hearing at which petitioner was directed to appear in person (accompanied by counsel if he wished) and show cause why the conditional orders should not be made final. The court directed that copies of its judgment and of the district court's order setting the matter for hearing be served on the attorney who had filed the response on petitioner's behalf in the court of appeals (*i.e.*, his present counsel) and on petitioner's counsel at his state trial; that copies also be mailed to petitioner at his last known address; and that a transcript of the ordered hearing be certified to it (App., *infra*).[3]

[3] We have been advised by the United States Attorney that on September 18, 1973 (subsequent to the filing of the certiorari petition), a hearing was held by the district court pursuant to the court of appeals' judgment. As appears from an order of the district court entered September 20, 1973, a copy of which has been supplied us by the United States Attorney and is being lodged herewith for the Court's information, petitioner's counsel appeared at the hearing, but not petitioner. The order indicates that the attorney gave no explanation at the hearing for the failure of petitioner to appear and that he was unaware of petitioner's whereabouts. Exhibits reflecting petitioner's state

1. Petitioner's contention that the challenged conditional orders are invalid because the constructive custody from which he fled was that of the State of Georgia, not the United States, and had to do with charges unrelated to those involved in his federal appeal (Pet. 4–5, 16–17) is answered in the opinion of the court of appeals (App., *infra*, p. 11), on which, as to this point, we principally rely. As the opinion notes, petitioner's escape from state custody, his subsequent state conviction, the revocation of his state bail bond, the fact that he remains at large despite the existence of the state bench warrant, and the fact that his response filed in the court of appeals contains no indication of his whereabouts nor any affirmative averment that he intends to submit himself to the jurisdiction of the court or of the State of Georgia constitute sufficient grounds for concluding that petitioner intends to abide by the court's judgment only if it is favorable to him. Granting that petitioner's probable principal reason for remaining at large is to avoid service of the 40-year state sentence, which he presumably now knows was imposed on him, it is evident that he could not surrender to start service of his federal sentence (should the court of appeals affirm it) without at the same time subjecting himself—then or eventually—to arrest under the outstanding state warrant.

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court conviction and sentence, the ensuing forfeiture of his state bond, and the issuance of the bench warrant for his arrest were introduced at the hearing by the government. The court concluded that, insufficient cause having been shown by petitioner or his counsel, there was no reason why the conditional orders of the court of appeals should not be made final, and it directed that the court of appeals be so advised.

2. There is no merit to petitioner's contention that the contested orders are invalid because the supporting factual representations were not sworn to (Pet. 3–4, 5, 13–15, 19). While it is true that petitioner did not acknowledge the truth of the representations, neither did he deny them. Nor did the response filed on his behalf by his attorney rely on the absence of a supporting affidavit. The representations related to matters of public record—the proceedings of a state court—proof of which could readily have been supplied had it been specifically demanded.[4] At least in such circumstances, a court can properly rely on unsworn representations made to it in an important matter by a responsible public official.[5]

3. Also without substance is petitioner's claim that the court of appeals could not properly rule on the motion to revoke his appeal bond without first notifying him that the motion was under consideration (Pet. 4, 18–19). The record reflects that copies of the motion were served by mail by government counsel both on

[4] As noted in footnote 3, *supra*, copies of the pertinent state court records were in fact introduced by the government at the September 18, 1973, hearing in the district court.

[5] There is no substance to petitioner's suggestion that the government's representation that he "'escaped' from custody" was inconsistent with its assertion that his state bond was thereupon forfeited—and that the allegations were consequently unreliable (Pet. 17–18). Petitioner's claim is that he "would not * * * [have been] on bond if he was in custody." However, government counsel did not say that petitioner had escaped "from custody," but that he had escaped "from the Fulton County Courthouse" (R. 2, 5, 7). Read in context with what followed, the statement's evident meaning was that petitioner had fled from the courthouse while free on bond—in other words, that he had "jumped" his state bail.

petitioner and on his court of appeals counsel (R. 8). Both presumably were aware, therefore, that the revocation motion was pending. The revocation motion, moreover, was based on the same facts as the dismissal motion—notice of which petitioner concedes he received (Pet. 9, 18)—and the relief sought by each was to all intents and purposes identical. There is thus in any event no basis for a claim of prejudice.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[6] The court of appeals properly placed on petitioner, contrary to a further suggestion of the petition (Pet. 4, 14–15), the burden of showing cause at the ordered hearing why its conditional orders should not be made final. Since the government, in its motions, had made a *prima facie* showing of grounds for the relief sought, the burden of overcoming the showing was properly petitioner's.

There is no conflict between the decision below and *Lannom* v. *United States*, 401 F. 2d 504 (C.A. 9), relied on by petitioner (Pet. 15). In that case the Ninth Circuit, without articulating a reason, denied a motion by the government to dismiss an appeal from a conviction, based on the ground that the appellant had jumped bail and was a fugitive. So far as appears, the court denied the requested relief as a discretionary matter—a conclusion suggested by the fact that it then proceeded to affirm the conviction. Since there is no indication that the court in *Lannom* deemed itself bound to consider the merits of the appeal notwithstanding the appellant's status as a fugitive, the decision is reconcilable with the court's holding in this case. The court held no more here than that an appellate court has "the power and authority" to dismiss an appeal in these circumstances (App., *infra*, p. 10)—an authority it determined in its discretion to exercise.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1776

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN PAUL SHELTON, DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Georgia

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(AUGUST 2, 1973)

BEFORE BELL, GODBOLD AND INGRAHAM, CIRCUIT JUDGES.

BY THE COURT: Shelton was convicted in federal district court of interstate transportation and concealment of a stolen motor vehicle, was sentenced to two concurrent five-year terms on February 2, 1973, and filed notice of appeal on March 5. The District Court granted Shelton release pending appeal on condition of $5,000 bond with surety.

On June 1 Shelton escaped from state custody during his trial on state charges of forgery.[1] He was found guilty on the forgery charges, his state bond was for-

[1] While the jury was deliberating.

feited and a bench warrant issued. He remains at large. On June 1, the same day that Shelton escaped, his pro se brief in the appeal from the federal conviction was filed in this court.

On June 18 the District Court held a show cause hearing in response to a motion by the U.S. Attorney to revoke or forfeit the appeal bond. Shelton did not appear at that hearing nor was he represented by counsel.[2] The District Court determined that it lacked jurisdiction to order forfeiture of the bond.[3]

The United States has now filed with this court a motion to revoke or forfeit Shelton's appeal bond and a motion to dismiss the appeal on the basis that Shelton has absconded and defied the authority of this court. An attorney, who did not represent Shelton in the trial of the federal charge or of the state charge, has filed a response to the government's motions contending that Shelton has neither breached the conditions of the federal bond nor evidenced any intent not to obey the judgment of this court.

An appellate court has the power and authority to dismiss the appeal of an appellant who has escaped from custody or jumped bail, the rationale being variously expressed as disentitlement of the appellant to call upon the resources of the court to consider his claim, as discretion of the court to refuse to consider the claim of a litigant who indicates that he will comply with the court's decree only if it is favorable, or as the lack of a justiciable controversy. *Molinaro* v.

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[2] The attorneys who represented Shelton in the state proceedings advised the District Court that they did not represent Shelton in his federal appeal.

[3] The conditions of the bond are that Shelton appear before this court, abide by and obey its orders, and surrender himself if his conviction is affirmed. There are no conditions limiting Shelton to remaining within any particular geographical area pending his appeal.

New Jersey, 396 U.S. 365, 24 L.Ed. 2d 586 (1970); *Eisler v. U.S.*, 338 U.S. 189, 93 L.Ed. 1897, *dism'd* 338 U.S. 883, 94 L.Ed. 542 (1949); *Smith v. U.S.*, 94 U.S. 97, 24 L.Ed. 32 (1876); *Johnson v. Laird,* 432 F.2d 77 (CA9, 1970); *U.S. v. O'Neal,* 453 F.2d 344 (CA10, 1972); *U.S. v. Dawson,* 350 F.2d 396 (CA6, 1965). In this instance the custody fled is that of another sovereign and upon a charge unrelated to that embraced in the federal appeal. We conclude, however, that the escape from state custody, the subsequent state conviction, the revocation of the state bond, the fact that Shelton remains at large despite the existence of the state bench warrant, and the fact that the response filed in this court contains no indication of his whereabouts nor any affirmative averments that he intends to submit himself to jurisdiction of this court or of the State of Georgia, constitute sufficient probable cause for this court to conclude that appellant will not comply with orders of this court and will abide its decree only if favorable to him. We therefore conditionally revoke his appeal bond and conditionally dismiss his appeal. The cause is remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final. Copies of this order and of the District Court's order setting the matter for hearing shall be served upon counsel who filed the response in this court, upon appellant's counsel in his state trial, and a copy of each mailed to appellant's last known address. A transcript of the District Court hearing shall be certified to this court

The motions of the United States are conditionally GRANTED and the CAUSE REMANDED to the District Court for further proceedings as hereinabove provided.

U.S. GOVERNMENT PRINTING OFFICE: 1973